Supreme Court, U.S.
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No. 98-382

In The

Supreme Court of the United States

October Term 1997

GENE SCHMIDT and PEGGY SCHMIDT, the heirs of Decedent STEPHANIE SCHMIDT and GENE SCHMIDT, the special administrator of her Estate, on behalf of STEPHANIE SCHMIDT,

Petitioners,

v.

HTG, INC., THOMAS E. HAMILTON, the STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS, and ROBERT SCHIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX B

SCHMIDT, et al.,
Appellees/Cross-appellants,
v.
HTG, INC., et al.,
Appellants/Cross-appellees.
Nos. 79039, 79,040.
District Court of Crawford County, Kansas
December 5, 1996
Syllabus of the Court

MEMORANDUM DECISION

The above-entitled matter is before the Court for resolution of summary judgment motions fled herein by the defendants. The summary judgment motions filed by the Kansas Department of Corrections and Robert Schirk (State Defendants), and by HTG, Inc., and Thomas E. Hamilton (Hamilton) will be addressed separately. This will develop one series of Findings of Fact, which will uniformly apply to the motions filed on behalf of both sets of defendants.

BACKGROUND

This matter arises out of the tragic murder of Stephanie Schmidt on or about July 1, 1993. At the time of her death, Ms. Schmidt was a student at Pittsburg State University in Pittsburg, Kansas. The perpetrator of Ms. Schmidt's murder, Donald Ray

Gideon, was eventually apprehended, convicted, and sentenced to a lengthy prison sentence.

The plaintiffs in the instant case are the natural parents and sister of the decedent. At oral argument on the summary judgment motions, counsel for plaintiffs acknowledged that the decedent's sister, Jennifer Schmidt, cannot bring suit on a state claim. Plaintiffs' counsel does allege, however, that siblings can appropriately pursue a claim pursuant to 42 U.S.C. Sec. 1983.

Plaintiffs' counsel further acknowledges that Sec. 1983 claims cannot presently be pursued against the state defendants in an official capacity.

FINDINGS OF FACT

1. Donald Ray Gideon was conditionally released from prison by mandatory operation of law on November 5, 1992. Gideon had served his maximum sentence as required by law less "good time" credits. Gideon had served an approximate ten (10) year prison sentence resulting from a previous conviction for sodomy and rape. Upon his release from prison, Gideon was placed on parole, which was supervised by defendant Schirk.

2. Defendant Schirk completed a Risk and Needs Assessment upon Gideon to determine the level of supervision required by Gideon. Gideon was assessed as a "high risk" when he was first released from incarceration and placed under the supervision of defendant Schirk. Further, it is the policy of defendant Department of Corrections (DOC) to classify all sex offenders as high risk.

3. On the day he was released from prison,

Gideon signed a Conditional Release Certificate which imposed certain conditions of release as a requirement of parole. Defendant Schirk reviewed these conditions with Gideon. Defendant Schirk also referred Gideon to a mental health therapist and ordered that Gideon obtain employment. Defendant Schirk, as Gideon's parole officer, possessed the inherent authority to impose additional conditions as circumstances warranted.

4. Gideon initially obtained employment at Superior Industries, but quit his job soon after. Gideon then obtained employment at Hamilton's Restaurant in December of 1992. Gideon was not referred to Hamilton's for potential employment by defendant Schirk. Nor did Schirk ever give any representative of Hamilton's any means of reference or recommendation on behalf of Gideon. Gideon's employment at Hamilton's was obtained without involvement from defendant Schirk.

5. "Hamilton's" was a small restaurant located in Pittsburg, Kansas. It opened for business in December of 1992. Defendant Thomas E. Hamilton, in the Fall of 1992, had agreed to manage a restaurant which was to be financed by two other individuals. Defendant, Hamilton, and two other individuals eventually formed HTG, Inc., which then became the parent company of "Hamilton's".

6. Defendant Hamilton did all the hiring and firing for the restaurant. Defendant Hamilton has extensive experience in the food service industry and has hired approximately 1,000 employees in his career. Defendant Hamilton never ran a "records check" on any potential employee to ascertain the presence of prior criminal convictions nor has he ever fired, or was told to

fire, anybody for falsifying an employment application.

7. Defendant Hamilton hired Gideon to work at Hamilton's without any sort of background check. Gideon was initially hired on a part-time basis, however, his hours were later increased to essential full-time. Gideon was employed at Hamilton's from December of 1992 until very early July of 1993.

8. Defendant Hamilton also hired Stephanie Schmidt (victim) to work at Hamilton's. The victim was a student at Pittsburg State University at the time. the victim was hired in December of 1992 and worked at the restaurant until mid-June of 1993, at which time her employment was terminated by reason of a dispute resulting from her handling of a customer order. The victim left work that day and did not return. She was eventually replaced. The victim was not employed at Hamilton's at the time of her tragic murder on or around July 1, 1993.

9. At the time he was initially hired, Gideon did not inform defendant Hamilton of his prior incarceration and the fact that Gideon was at that time on parole. Hamilton remained unaware of Gideon's history and status until February of 1993. At that time Gideon finally admitted his prior incarceration to Hamilton, however, even then Gideon did not admit tot the prior rape conviction, but rather Gideon told Hamilton that the incarceration resulted from a bar fight in which Gideon severely beat an individually with an ax handle and broke the individual's legs in so doing. This information eventually became known by Gideon's co-employees, including the victim.

10. Defendant Hamilton, after Gideon's admission concerning the his prior incarceration, became aware that Gideon was on parole, had a parole officer,

and was counseling with a mental health therapist. Hamilton assumed the counseling was a requirement of Gideon's parole. Hamilton had a chance meeting with Schirk at a convenience store in May or June of 1993. Hamilton did not inquire of Schirk concerning Gideon's crime of conviction, nor did Schirk volunteer any information. When asked by Schirk, Hamilton responded by Gideon was doing fine. This chance meeting was the only contact that ever occurred between Schirk and Hamilton.

11. Defendant Hamilton never attempted to verify in any manner the information that was self-reported by Gideon in February of 1993.

12. Hamilton never received any complaints from his employees concerning Gideon's conduct towards them. Gideon was polite, dependable, and soft-spoken while at work. The waitresses liked Gideon.

13. The victim advised her father (Plaintiff Gene Schmidt) that Gideon was nice to her, that he did not try to hit on her for a date, that she trusted him, and that Gideon assisted the waitresses in protecting their tips.

14. Hamilton likewise trusted Gideon and would occasionally allow Gideon to transport Hamilton's fiancee and daughter to work.

15. On one occasion Gideon told Hamilton that Gideon had slapped a woman for insulting him and had thrown her purse down the stairs. On another occasion Gideon reported to Hamilton that Gideon had told a woman that she would have to leave his apartment unless she had oral sex with him. Hamilton advised Gideon that this was inappropriate conduct. Hamilton, on another occasion, gave Gideon a day off work due to a fight Gideon had been involved in at a local tavern.

16. As of November 1992, Schirk had been a parole officer with the Department of Corrections approximately twelve years. Schirk had supervised paroled sex offenders throughout his career.

17. Schirk never told Hamilton or any of the restaurant employees that Gideon was a paroled sex offender. Schirk did not disclose this information to Hamilton because of concern that Gideon would then be fired. Schirk's goal for Gideon was to assist Gideon in integrating back into society. Schirk believes, pursuant to his training and experience, that society is better protected from recidivism by ensuring that parolees are employed and self-supporting.

18. Hamilton would have told Schirk about Gideon's inappropriate conduct, detailed herein in paragraph #15, had Schirk informed Hamilton of Gideon's full criminal history. Moreover, Hamilton would have informed his employees of this information.

19. Hamilton would not have initially hired Gideon had Hamilton known of Gideon's history.

20. Gideon eventually advised Schirk that Gideon told Hamilton of his parole status. Schirk did not contact Hamilton to determine if the information divulged by Gideon to Hamilton was correct.

21. Schirk acknowledges that it is highly likely that a convicted sex offender will reoffend, accordingly, the conditions and restrictions placed on a paroled sex offender are to be geared towards the protection of the public.

22. While supervised by defendant, Schirk, Gideon did not have any contacts with law enforcement. Gideon reported as directed, maintained employment, participated in mental health counseling, made payments on costs and restitution, and reported spending time in

appropriate pursuits. Schirk was never advised of Gideon's above-referenced inappropriate conduct with women. Schirk believed Gideon was adequately complying with the conditions of parole.

23. Schirk was aware that young women were employed at Hamilton's and that Gideon's prior conviction was for the rape and sodomy of a young woman. Schirk acknowledges that the female employees of Hamilton's restaurant were at a high risk of harm pursuant to their work association with Gideon.

24. By May of 1993, Schirk no longer believed Gideon would lose his employment at Hamilton's if Schirk would have informed Hamilton of Gideon's past criminal history.

25. In 1992 and 1993, the DOC recognized an unwritten policy which required the notification nsf a parolee's pst criminal history to a third-party who was determined to be at risk through association with the parolee. Present DOC policy regarding third-party notification has been reduced to writing and requires employee notification.

26. On the evening of June 30, 1993, the victim and several of her friends went to a bar in Frontenac, Kansas, to celebrate the victim's upcoming birthday. The entourage met Gideon at the bar. The victim later became ill and accepted a ride home from Gideon. The victim and Gideon left together and the victim was never again seen alive. Gideon was later convicted of the victim's rape and homicide.

CONCLUSIONS OF LAW REGARDING HAMILTON MOTION FOR SUMMARY JUDGMENT

Summary Judgement is not appropriate if "the dispute

about a material fact is 'genuine', that is if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 91 L.#d. 2d 202. A material fact is one that outcome controlling. Anderson, supra. If a reasonable fact finder could draw more than one inference from the facts, then a trial court should deny a summary judgment motion. IN considering a summary judgment motion, the trial court must view the evidence in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144.

It has been observed that an issue of material fact is not automatically made genuine by the existence of some evidence to support it. Rather, the issue can only be termed "genuine" when there is sufficient evidence to defeat a motion for directed verdict or summary judgment motion. The Anderson Court discussed the standard as follows:

> "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find a preponderance of the evidence that the plaintiff is entitled to a verdict - whether there is [evidence] upon which a jury an properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Anderson, at 214.

Our Kansas Supreme Court has consistently

provided that the determination of negligence, proximate cause, and foreseeability are questions of fact to be resolved by a jury. Se St. Clair v. Denny, 245 Kan. 414; and, Nero v. Kansas State University, 253 Kan. 567.

Generally, in order to prevail on a claim of negligence, a party plaintiff must provide the following:

1. A relationship between the plaintiff and defendant under which the defendant owes the plaintiff an obligation to use due care;
2. A breach of duty;
3. Damage suffered by the plaintiff, and,
4. A causal connection between the breach and the damage suffered.

Honeycutt v. City of Wichita, 251 Kan. 451, Syl. 8.

The Honeycutt opinion further observes that whether a duty exists is a question of law while whether a duty has been breached is a question of fact. Honeycutt, supra, Syl 8.

The plaintiffs' claim in the instant matter against Hamilton is premised in the negligent hiring and retention of Gideon. This claim has long been recognized in Kansas:

> "A master may be liable for injuries to a third person which are the direct result of the incompetence or unfitness of his servant where the mater was negligent in employing the servant or in retaining him in employment when the master knew or should have known of such incompetence or unfitness of the servant." Hollinger v. Stormont Hospital and Training School for Nurses, 2 Kan. App. 2d 302, Syl. 1;

Bolin v. Lyle Rishel Post No. 68, 177 Kan. 520, Syl. 4; and, Murray v. Modoc State Bank, 181 Kan 642, Syl. 1.

It is important to note at this juncture that the plaintiffs' claim herein is not premised in the doctrine of respondeat superior. Rather, this is an actio pursuant to the common law charging Hamilton with actionable negligence in the hiring and retention of Gideon, who is alleged to have been an incompetent or unfit employee. Accordingly, it is not necessary to determine if Gideon was acting within the scope of his employment at the time he caused the death of Stephanie Schmidt.

The Court is mindful of the four criteria, established in Honeycutt, which must be proven before an action premised in negligence can be successful. These four criteria have been previously listed in this opinion. Of the four listed criteria, it is the first one that controls the determination of this matter. The latter three criteria involve matters to be decided by a jury, however, determining if a relationship exists between the parties which imparts a duty is solely a question of law. Honeycutt, supra.

It is then to the determination of whether a duty exists herein that the Court now turns its attention. Essentially Hamilton argues that no duty was owed to the decedent because she was no longer an employee of Hamilton's. Accordingly, Hamilton alleges that he owed no greater duty to the decedent than is owed to the public at large. Hamilton reasons that it would be a quantum leap to suggest that he owes a duty to a former employee who was murdered by an off-duty employee at another premises in a different city.

Case law clearly provides that an employer owes

a duty to an employee to protect the employee from foreseeable harm. Cansler v. State, 234 Kan. 554. Moreover, an employer is obligated to provide his employees with suitable co-employees. Jackson v. Cit of Kansas City, 235 Kan. 278; and Gaines v. Mnsanto Co., 655 S.W. 2d 568. Hamilton does not necessarily take issue with these precepts, rather, Hamilton argues they do not apply herein because the decedent was no longer an employee of Hamilton's at the time of her death.

The plaintiffs respond to this argument by first noting that it is well recognized that an employer owes a duty to his employee to protect the employee from foreseeable harm. The plaintiff references the following quote from Prosser, Law of Torts, Sec. 46, pp. 348-50, 4th Ed. (1971), as cited in Cansler, supra, at pp. 558-59:

> "The general duty which arises in many relations to take reasonable precautions for the safety of another may include the obligations to exercise control over the conduct of third persons. Thus, the duty of a carrier toward its passengers may require it to maintain order in its trains and stations, and to use reasonable care to prevent not only conduct which is merely negligent, but also personal attacks or thefts of property on the part of other passengers or strangers. A similar obligation rests upon innkeepers toward their guests, upon employers toward their employees, a jailer toward his prisoner, ... and in a large number of cases, it has been extended to owners of premises who hold them open to business visitors...In al

> such cases, the duty is not an absolute one to ensure safety, but requires only reasonable care, an there is no liability where such care has been used, or the defendant either knows or has an reason to know that it is called for" (Emphasis Supplied).

The duty that triggers an obligation to use due care to protect another from harm is created by a relationship between a defendant and the person harmed or the defendant and the third party:

> "It is the general rule that an actor has no duty to control the conduct of a third person to prevent that person from causing harm to others unless a 'special relationship' exists between the actor and the third party or the actor and the injured party." Theis v. Cooper, 243 Kan. 149, 151.

Defendant Hamilton essentially argues that no duty was owed to the decedent at the time of her death because she as a former employee over whom Hamilton had no control or custodial responsibility. Hamilton further alleges that he had no control over Gideon at the time of the murder because Gideon was off duty, no on the premises, and not in the possessio of any instrumentality provided by Hamilton.

The Plaintiffs counter by arguing that Hamilton misconstrues their cause-of-action. The plaintiffs point out that their lawsuit against Hamilton is premised upon Hamilton's negligent hiring and retention of Gideon,

and not upon the doctrine of respondeat superior. The plaintiffs allege that their claims against hamilton are not based on an assertion that Hamilton had a duty to control Gideon, rather, the claims are based upon Hamilton's own independent and allegedly tortious act of hiring and retaining Gideon. Plaintiffs allege that Hamilton's negligent act occurred while the decedent was still an employee of the restaurant - at a time when a duty was owed to the decedent by Hamilton pursuant to the obligation recognized in Jackson and Gaines that an employer hire suitable co-employees. The plaintiffs further allege that it is Hamilton's violation of said duty that set off a sequential chain of events that eventually resulted in the homicide of the decedent. Generally, the plaintiffs argue that "but for" the alleged negligent hiring and retaining of Gideon, the decedent would never have consented to allow Gideon to drive her home on that fateful night.

The main thrust of Hamilton's defense is two fold: 1. Hamilton did not have a duty to control Gideon as the assault occurred off-premises; and, 2. Hamilton owed no duty to the decedent because she was no longer an employee of the restaurant at the time of her homicide. The cases cited by Hamilton in support of his summary judgment motion speak to this two-fold defense and the duty owed by an actor to the harmed party or a third party aggressor.

In response to this two-fold defense, plaintiffs argue that whether Hamilton had a duty to control Gideon is irrelevant because their claims are not premised in an alleged failure to control Gideon. With respect to the second prong, plaintiffs allege that it is not necessary to determine what, if any, duty was owed by Hamilton to the decedent at the time for her death

because the tort of which the plaintiffs complain had already been committed by Hamilton when he hired and retained Gideon. Plaintiffs reason that the torn was allegedly initiated while the decedent was still an employee of the restaurant - at a time when a duty was owed t the decedent. In support of this position, the plaintiffs heavily rely upon Gaines, supra. The Gaines decision is on point. The underlying factual scenario in Gaines is remarkable similar to the instant matter. The employer, Monsanto Company, hired an individual to work as a mail clerk. Subsequently, this individual murdered Kasandra Gaines, who also worked for Monsanto as a secretary. The murder occurred off-premises. The trial court granted Monsanto's summary judgment motion. On appeal, summary judgment was set aside and the case was remanded for trial. The Missouri Court of Appeals observed as follows:

> "We conclude that an employer may be directly liable for negligent hiring or negligent retention of an employee where the employer knew or should have known of the employee's dangerous proclivities and the employer's negligence was the proximate cause of the plaintiff's injury. Negligent hiring or retention liability is independent of respondeat superior liability for negligent acts of an employee acting within the scope of his employment." Gaines, at 570.

The Gaines court further observed:

"Matters of foreseeability and proximate

cause must be left for the court and jury after presented of evidence. Generally, it is sufficient to constitute proximate cause that the negligence charged was the efficient cause which set in motion the chain of circumstances leading up to the injury." Gaines, at 571.

Finally, the Gaines decision provides that:

"In our view, however, the decision as to whether an employer is negligent in hiring or retaining a person in a given job should be made by the fact finder after hearing evidence." Gaines, at 572.

In the final analysis, Hamilton argues a lack of a duty owed at the time of the death of Stephanie Schmidt. Hamilton's brief is quite well-prepared and very extensively, and correctly, discusses existing torn law as it relates to the concept of duty regarding a tortfeasor or an injured party. Obviously it must be shown that Hamilton possessed a duty towards the decedent before potential liability can attach. Honeycutt, supra. Indeed, the plaintiffs do not deny this requirement. Rather, in order to satisfy the duty requirement, the plaintiffs merely point out that case law mandates than an employer exercise due care in the hiring of co-employees. See Hollinger, Jackson, and Gaines, supra. The plaintiffs allege that it was this recognized duty that was abrogated by Hamilton in the hiring and retaining of Gideon while the decedent was an employee of the restaurant. Thy is when the tort is alleged to have been initiated and which allegedly set off a chain-of-events fall

within the realm of foreseeability is a matter to be determined by a jury.

Counsel for Hamilton stated during oral argument on the summary judgment motion that the plaintiffs had not addressed duty in their brief. Yet the sundry cases cited by the plaintiffs very definitely discuss, and impose, a duty upon an employer to hire appropriate employees. This is a duty wholly independent of that imposed by the Restatement (Second) of Torts, Sec. 315 (1964).

In the final analysis, the Court notes that a district court is required to resolve all facts and inferences which can be reasonably deduced from the evidence in favor of the party opposing a motion for summary judgment. Allsup v. Mount Carmel Medical Center, 22 Kan. Ap. 2d 61, 166. With this in mind, and in keeping with the aforementioned findings and conclusions, the Court denies the motion for summary judgment filed by Hamilton. The Court finds that a duty did exist at a time when the decedent was employed by Hamilton, and that duty is the requirement that suitable co-employees be hired and retained. Whether that duty was breached and whether any alleged breach resulted in the foreseeable murder of the decedent is a question to be addressed by the jury The Court, however, does agree that the decedent's sister, Jennifer Schmidt, is not a recognizable "heir at law" who has sustained a loss because both of the decedent's parents are living. Accordingly, the Court finds that Jennifer Schmidt has no actionable wrongful death claim in this matter and she is deleted as a party.

CONCLUSIONS OF LAW REGARDING STATE DEFENDANTS' MOTION OF SUMMARY JUDGMENT

Initially, the Court adopts the Summary Judgment standards expressed in the Court's Conclusions of Law Regarding Hamilton Motion for Summary Judgment.

STATE CLAIMS

Kansas appellate courts have long held that a person, including a government official, can be held liable in damages to an individual harmed by the actions of third person if, "(1) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person or to warn others about that third persons' dangerous propensities, or (2) a special relationship exists between the actor and the other which gives rise to the other a right to protection." Washington v. State of Kansas, 17 Kan.App. 2d 518, 521.

A "special relationship" may exist between a parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another. Nero v. Kansas State University, 253 Kan. 567. The Kansas Supreme Court has further observed that a duty or special relationship may arise when one creates a foreseeable peril, which is not readily discoverable, and fails to warn of the risk. Robertson v. City of Topeka, 231 Kan. 358.

The Restatement of (Second) of Torts, Sec. 315, has observed that when a defendant stands in a special relationship to either the dangerous person or the

potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim.

Plaintiffs cite Division of Corrections v. Neakok, 731 P.2d 1121, in support of their position herein. Neakok is of assistance to the Court. It essentially provides that a special relationship exists between a parole officer and the parolee he supervises. The Neakok decision indicates that a parole officer has a duty to warn the foreseeable victims of a parolee with dangerous propensities. Id. At 1130. The opinion observed that generally a duty to warn applies only to specifically identifiable victims, however, this requirement does not mean that a particular named individual need be identified as a potential victim. Rather, it is only necessary that a "readily identifiable group of victims" be ascertained. Id. At 1132.

Additional guidance in determining duty is provided by Rieser v. District of Columbia, 563 F.2d 462. The Rieser opinion observed:

> "Placement of Whalen [the parolee] in a maintenance position at McLean Gardens put him close proximity to the women tenants, with the opportunity to observe their habits, and gave him potential access to the keys to their apartments and dormitory rooms... The jury could conclude that a breach of Abron's general duty would present a specific and unreasonable risk of harm to the women tenants of McLean Gardens therefore giving rise to a special duty toward them. On this theory, it was not error to allow

the question of liability to go to the jury." Reiser. at 479.

In the present matter, Gidoen was a parolee under the direct supervision of defendant Schirk. Schirk was aware of Gideon's pst record and was aware that Gideon was potentially dangerous. It is readily apparent that a special relationship existed between Schirk (parole officer) and Gideon (parolee). Moreover, as the Court observed in its Finding of Fact, the DOC had adopted an unwritten policy of warning individuals potentially at risk from parolees. After adopting this policy, it hen became incumbent upon the DOC to administer this policy in an effective manner. This observation applies all the more strongly to members of a "readily identifiable group of victims" (Hamiltons' waitresses).

The state defendants further argue that Schirks actions were discretionary and accordingly he is immune from suit pursuant to K.S.A. 75-6104(e). The Kansas Supreme Court recently addressed this issue in C.J.W. v. State of Kansas, 253 Kan. 1. In C.J.W., the Court held:

> "Simply stated, our more recent cases hold that the discretionary function exception is to applicable in those situations where a legal duty exists, either by case law or statute, which the governmental agency is required to follow. The governmental agency cannot properly claim that its challenged action falls within the discretionary function exception where the actin taken violated a legal duty." C.J.W., at 14.

Moreover, our Supreme Court has stated:

> "The Kansas Tort Claims Act make liability the rule and immunity the exception, and the burden is on the State to establish its entitlement to any of the exceptions set forth in K.S.A. 1992 Supp. 75-6104. If the State cannot meet this burden, then the general rule of liability set forth in K.S.A. 75-6103 governs." C.J.W., Syl. 6.

Our Supreme Court has further observed that:

> "Under the Kansas Tort Claims Act, a governmental agency does not have a discretionary right to violate a legal duty and avoid liability. To so hold would completely nullify the purpose of the Kansas Tort Claims Act." Dougan v. Rossville Drainage Dist, 243 Kan. 315, 325.

It is then readily apparent that if a legal duty exists, the government cannot utilize the discretionary function exception. Our Supreme Court has referred to the Restatement (Second) of Torts, Sections 315 and 319 in prior cases in which it was found that the State did indeed have a duty:

> "It is the rule in this state that one who takes charge of a third person, whom he knows or should know to be likely to cause bodily harm to others if not

> controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Cansler v. State, 234 Kan. 554, Syl. 1.

This Court has previously found that a "special relationship" existed between the state defendants and Gideon. This finding is supported by the above-referenced case law and the Restatement (Second) of Torts. It can hardly be argued that the state defendants did not take charge of Gideon. Accordingly, the Court finds that a duty existed on the part of the state defendants as those in charge of a person with dangerous propensities. Having found that a duty existed, the court finds that the discretionary function exception does not apply herein.

Moreover, it can be argued that the DOC's adoption of the unwritten warning policy created a duty to those potentially and identifiably at risk. Accordingly, an alleged breach of said duty would certainly mitigate against the discretionary function exception.

The state defendants further allege that they are entitled to the police function immunity provided by KSA 75-6104(n). This defense does not apply when the underlying basis for the action is premised upon the breach of a specific duty owed to an individual as opposed to the public at large. Washington v. Kansas, 17 Kan.App.2d 518. Further, the plaintiffs' claims are based upon negligent supervision, not a failure to provide police protection. Clearly this defense is not applicable.

The plaintiffs stipulate that Jennifer's state claims are not presently permissible pursuant to Kansas law.

Accordingly, the motion for summary judgment with respect to Jennifer's state claims is sustained. The motion for summary judgment with regard to the state claims of the remaining plaintiffs is denied.

CLAIMS PURSUANT TO 42 U.S.C. SECTION 1983

The state defendants essentially argue that summary judgment is appropriate with respect to the plaintiffs' Section 1983 claims because the plaintiffs cannot demonstrate either of the two exceptions to the general rule that state actors are normally liable under the Due Process Clause for their own acts and not for private misdeeds. The two recognized exceptions are: (1) the special relationship doctrine; and (2) the "danger creation" theory. DeShaney v. Winnebago County Dept. Social Services, 489 U.S. 189.

Before further discussion of this matter, the Court notes that plaintiffs acknowledge that their Section 1983 claims against the State of Kansas and the DOC are not presently allowed under law. Accordingly, summary judgment is granted with respect to the Section 1983 claims against the State of Kansas ant the DOC. That leaves the Section 1983 claim against Schirk to be resolved.

Of the two recognizable exceptions in DeShaney, only the "danger creation" theory is germane herein. The Tenth Circuit has addressed the "danger creation" theory and has indicated that the necessary elements for proving the theory are as follow:

1. The party aggrieved must be a member of a limited and specifically identifiable group;
2. The defendant's conduct placed the

aggrieved party at substantial risk of serious and immediate harm;

3. The risk was obvious and known;
4. The defendant acted recklessly in conscious disregard of that risk; and,
5. The conduct, when viewed in total, is shocking to the conscience. Medina v. City and County of Denver, 960 F.2d 1493; and. Collins v. City of Harker Heights, Tex., 503 U.S. 115.

Essentially the state defendants argue that there is no showing that the actions of Schirk were in reckless or conscious disregard of risk, and that Schirk's conduct does not shock the conscience when viewed in the totality of the circumstances. It is necessary to define "reckless conduct" before this matter can be further addressed. "Reckless conduct" before this matter can be further addressed. "Reckless conduct" has been defined as an awareness or knowledge of an "obvious risk that was so great that it was highly probable that serious harm would follow an the or she proceeded in conscious and unreasonable disregard of the consequences." Medina, pg. 1496, (emphasis supplied). Moreover, it has been observed that a Section 1983 claim must be predicated on state action manifesting either an intent or harm or an intent to place a person unreasonably at risk of harm. Medina, Id., (emphasis supplied).

The "shock the conscience" standard cannot be met by ordinary negligent conduct. This standard traditionally presupposes deliberate wrongful decisions as opposed to negligent governmental conduct. A due process violation giving rise to a Section 1983 claim must be more than an ordinary tort to be actionable. Collins, supra, at 127-28.

Although plaintiffs argue quite strongly that Schirk's conduct was reckless, the Court disagrees. Arguably Schirk's conduct is actionable in the traditional "tort" sense of the word, yet the Court does not find that the record supports a showing of reckless conduct. That is, the plaintiffs have failed to demonstrate that Schirk was aware of a risk to Ms. Schmidt so great that it was highly probable that serious harm would occur. Nor have the plaintiffs demonstrated that Schirk proceeded in a conscious and unreasonable disregard of probable consequences with an intent to harm or an intent to place Ms. Schmidt in an unreasonable risk of harm. Again, it can perhaps be argued that Schirk's conduct was negligent, yet the complained of conduct falls short of that which is contemplated by a Section 1983 claim.

The facts which were developed in the discovery phase support this conclusion. Undeniably Schirk was aware that sex offenders are a high risk of re-offending. A logical extension of this awareness would be the knowledge that Gideon's female co-employees were at risk. Yet Schirk at that point in time had been given no reason to believe that Gideon was engaging in any inappropriate behavior which focused on the Hamilton waitresses. Gideon reported to Schirk as ordered, indicated no problems at work, and had maintained the same job for seven months. There was noting about Gideon's know conduct which would indicate to Schirk that the Hamilton waitresses were in specific danger of imminent harm. Accordingly, the plaintiffs have been unable to demonstrate either an intent to harm or an intent to place a person unreasonably at risk of harm, as per the requirement of Medina, supra.

As previously noted, the Court is required to consider the totality of the surrounding circumstances in

ruling on the propriety of a Section 1983 claim. Medina, supra. In doing go, the Court notes that Schirk's role i the supervene of Gidoen involved the balancing of competing interests: the protection of the public versus the rehabilitation of an offender. This as times is a difficult balancing act to accomplish. The Court has closely scrutinize Schirk's actions in fulfilling this role. The court does not find that Schirk's errors, if any, are so egregious and outrageous that the Court's conscience is shocked. Accordingly, summary judgment is granted to the state defendants with regard to the plaintiff's claims pursuant to 42 U.S.C. Section 1983.

Mr. Adler shall prepare a journal entry consistent with this opinion.

APPENDIX C

SCHMIDT, et al.,
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HTG, INC., et al.,
Appellants/Cross-appellees.
Nos. 79039, 79,040.
District Court of Crawford County, Kansas
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Syllabus of the Court

JOURNAL ENTRY OF JUDGMENT

NOW on this 6th day of May, 1997, the Court takes up state defendants' Motion for Summary Judgment as well as the Motion for Summary Judgment of defendants HTG, Inc. and Thomas Hamilton. The parties have filed briefs and appeared for oral argument on May 21, 1996. Plaintiffs appear by and through James F. Adler and Carlton Kennard. Defendants HTG, Inc. and Thomas Hamilton (Hamilton's) appear by and through legal counsel Michael K. Seck. Defendants State of Kansas, Department of Corrections and Robert Schirk (state defendants) appear by and through legal counsel Lisa A. Mendoza and Edward F. Britton, Jr. There are no other appearances.

WHEREUPON the Court, having reviewed the file, having heard the arguments of the parties, and being otherwise fully advised in the premises makes the following findings:

1. The Court has earlier ruled and reaffirms that having considered the affidavits, exhibits, and memoranda filed in support of the Motions for Summary Judgment of state defendants, HTG, Inc. and

Thomas Hamilton, and plaintiffs' response thereto, that these Motions are properly treated by the Court as Motions for Summary Judgment. The Court further finds that these Motions should be and are hereby affirmed in part and denied in part.

2. The Court adopts and incorporates herein by this reference the Findings of Fact, Nos. 1-26 as set forth in its Memorandum Decision, pp. 2-7, filed on December 5, 1996.

3. The Court further adopts and incorporates herein by this reference its Conclusions of Law Regarding Hamilton Motion for Summary Judgment set forth at pp. 8-15, and Conclusions of Law Regarding State Defendants' Motion for Summary Judgment set forth at pp. 15-23 of its Memorandum Decision dated December 5, 1996, finding that (1) plaintiff Jennifer Schmidt is not a recognizable "heir at law" who has sustained a loss because both of decedent's parents are living, that she has not actionable wrongful death claim in this matter against either Hamilton defendants of state defendants and she is deleted as a party plaintiff; (2) the Motion for Summary Judgment of the Hamilton defendants is denied; (3) the Motion for Summary Judgment of the state defendants on plaintiffs' state claims is denied; and (4) the Motion for Summary Judgment of state defendants on plaintiffs' claims pursuant to 42 U.S.C. § 1983 is granted.

4. Though the Court herein enters judgment on fewer than all of the claims of parties to the litigation and/or against less than all parties, the Court intends and finds that pursuant to K.S.A. 60-254(b) that there is no just reason for delay and expressly directs the entry of judgment on these claims and with respect to its rulings on the motions for summary judgment. This

judgment, therefore, is and is intended to be a final judgment authorizing interlocutory appeals by all parties from the entry of this judgment.

5. The Court further finds that pursuant to K.S.A. 60-2102(b) its rulings on State Defendants' Motion for Summary Judgment as well as on the rulings concerning defendants HTG, Inc. and Thomas Hamilton involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from he order(s) may materially advance the ultimate termination of the litigation.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiff Jennifer Schmidt is dismissed as a party to this action.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of defendant HTG, Inc. and Thomas Hamilton is denied.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of state defendants is granted in part and denied in part. With respect to plaintiffs' claims pursuant to 42 U.S.C. § 1983, state defendants' Motion for Summary Judgment is granted; however, state defendants' Motion for Summary Judgment on plaintiffs' state claims is denied.

IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED though judgment herein is entered on fewer than all of the claims of parties to the litigation and/or against less than all parties, the Court intends and finds that pursuant to K.S.A. 60-254(b) that there is no just reason for delay and expressly directs the entry of

judgment on these claims and with respect to its rulings on the motions for summary judgment. This judgment, therefore, is and is intended to be a final judgment authorizing interlocutory appeals by all parties from the entry of this judgment.

IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that pursuant to K.S.A. 60-2102(b) its ruling on State Defendants' Motion for Summary Judgment as well as on the rulings concerning defendants HTG, Inc. and Thomas Hamilton Motion for Summary Judgment involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order(s) may materially advance the ultimate termination of the litigation.

IT IS SO ORDERED.